

1 APPEARANCES:

2
3 FOR THE GOVERNMENT: OFFICE OF THE UNITED STATES ATTORNEY
4 BY: JUDITH A. HEINZ
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9 FOR DEFENDANT: OFFICE OF THE FEDERAL PUBLIC DEFENDER
10 BY: YASMIN CADER
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18 ALSO PRESENT: AGENT CHARLES CIVILETTO
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1 Los Angeles, California, Wednesday, November 6, 2013

2 11:00 a.m.

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4 THE CLERK: Calling CR 13-736-JFW, *United States of*
5 *America vs. Sinh Vinh Ngo Nguyen.*

6 Counsel, please state your appearance.

7 MS. HEINZ: Good morning, your Honor. Judith Heinz on
8 behalf of United States. With me at counsel table is Special
9 Agent Charles Civiletto of the Federal Bureau of Investigation.

10 MS. CADER: Good morning, your Honor. Yasmin Cader on
11 behalf of Mr. Nguyen. Also at counsel table is attorney Ron
12 Chowdhury, who has joined us as co-counsel in this case.

13 THE COURT: All right. Good morning to all.

14 This matter is on the Court's calendar for a hearing
15 on the Stipulation Regarding Request for Continuance of Trial
16 that was filed on October 30th, 2013. It appears as Document
17 No. 29.

18 I reviewed the stipulation, but without further input
19 or information from counsel, I was not inclined to sign the
20 stipulation, so we put on calendar this morning a hearing so I
21 could have a better idea from counsel as to the status of the
22 case, especially with respect to the discovery in the case.

23 On October 21st, I conducted the initial Trial Setting
24 Conference in this case and issued a Criminal Trial Order which
25 set a trial date of December 3rd and various pretrial --

1 deadline to file pretrial motions.

2 And at the hearing, I recognized that the case may
3 require some additional time to prepare and that there might be
4 a request to continue the trial date, as well as the pretrial
5 deadlines that the Court set. However, I thought I expressed my
6 intent to counsel that this case be tried by the end of the
7 year.

8 This proposed trial date of April 1st, 2014, is
9 certainly inconsistent with that; but nonetheless, I want to
10 discuss with counsel today the various filings that have been
11 made.

12 In addition to the information provided in the
13 stipulation that I referred to, Document No. 29, I've also
14 received two other documents in connection with the hearing
15 today. One is the Government's Supplemental Notice of Intent to
16 Invoke Classified Information Procedures Act, which was filed in
17 camera ex parte and under seal on October 25, 2013.

18 The other pleading was filed by counsel for the
19 defendant, and that was a Declaration of Counsel in Support of
20 the Stipulation. That was filed on October 31st, 2013. And
21 that document was filed in camera.

22 And have you looked at this document?

23 MS. CADER: I have, your Honor, and I apologize. I
24 see that there was misnumbering. I take full responsibility for
25 that. I had some --

1 THE COURT: It wasn't paginated. The paragraph
2 numbers are -- I think that I've been able to piece it together,
3 but really, in future filings, you need to take a closer look
4 before they're filed because it was --

5 MS. CADER: I understand.

6 THE COURT: It was very difficult to follow.

7 MS. CADER: I apologize for that, your Honor.

8 THE COURT: I also have seen on the docket this
9 morning there was another document that was on the docket, and
10 that was filed on November 5th, 2013. It appears as Document
11 No. 36, but, of course, since I guess I'm a member of the
12 public, my view is also -- I'm not able to look at it from the
13 docket, and I have no courtesy copy so I have no idea what this
14 document is.

15 Is this something that was filed by the Defense or by
16 the Government?

17 MS. HEINZ: Your Honor, the Government didn't file
18 anything yesterday.

19 MS. CADER: Nor did we, your Honor.

20 THE COURT: We have a mysterious --

21 MS. CADER: Well, we did file the issue in regards to
22 the CIPA motion, your Honor, which was filed and the Government
23 replied to that, but that was last -- I don't believe that
24 was -- that wasn't yesterday. That was last week.

25 THE COURT: All right. Well, I guess it will -- the

1 problem is if you do file things under seal, I need to have
2 courtesy copies delivered immediately, especially if there's a
3 hearing, because by the time the clerk's office brings the
4 documents up to the Court, it's sometimes several days, and I
5 need to see these documents sooner than later. So I --

6 MS. CADER: We didn't file anything, other than the
7 one declaration under seal, your Honor. That's all that we
8 filed under seal.

9 (The Court and the Courtroom Deputy Clerk confer off the record)

10 THE COURT: Shannon advises me that she is going to
11 look into it.

12 THE CLERK: Is that what I said?

13 THE COURT: That's how I interpreted what you said.

14 All right. Those are the two pleadings I have and I
15 have reviewed in connection with the hearing today.

16 So the first question that I have is why the
17 Government has filed a Supplemental Notice of Intent under seal
18 ex parte when the original Government's Notice of Intent to
19 Invoke the Classified Information Procedures Act, which was
20 filed on October 16th, 2013, as Document No. 6 was filed on the
21 public record?

22 MS. HEINZ: Yes, your Honor.

23 Two reasons: No. 1, because the supplemental notice
24 contained classified information and could not be filed in the
25 public record; and secondly, because after reading your Honor's

1 Criminal Trial Order, I know that your Honor wants very specific
2 information to support a request for a continuance of a trial
3 date, and so the Government believed that -- by providing
4 certain specific information to your Honor that itself was
5 classified could assist your Honor in evaluating that request.

6 THE COURT: Well, as I understand the original Notice
7 of Intent -- and correct me if I'm wrong -- the Government in
8 that -- in its original notice advised the Court during the
9 course of the Trial Setting Conference that it did not intend to
10 offer any -- let me make sure I have it accurate here -- in the
11 original filing at page 2 -- and I'm reading from Document
12 No. 6 -- *the Government does not intend to offer into evidence*
13 *or otherwise use against the defendant any information obtained*
14 *or derived from any, if any, electronic surveillance or physical*
15 *searches conducted pursuant to Foreign Intelligence Surveillance*
16 *Act of 1978 as amended in the proceedings in this case. Thus,*
17 *the Government will not be serving a notice under Title 50 of*
18 *the United States Code Section 1806(c) and 1825(d).*

19 So has there been a change from that?

20 MS. HEINZ: No, your Honor, there has not been a
21 change from that, but the Government -- the Government wanted
22 to -- first of all, wanted to inform your Honor that it
23 anticipates and it fully expects that it will be filing filings
24 with your Honor pursuant to CIPA, the Classified Information
25 Procedures Act; and secondly, as the Government expressed in its

1 supplemental notice, the Government believes that there is
2 classified information here that pertains to this case which the
3 Government expects it will need to bring to your Honor's
4 attention under CIPA. And in order to accomplish that, the
5 Government, quite frankly, needs additional time to do that.

6 THE COURT: But you indicate that that was supposed to
7 be in the supplemental notice.

8 The problem I have with the showing is there is no
9 benchmarks as to any of these items. Counsel are all over the
10 lot with respect to *we need to do this, we need to have this, we*
11 *need to do this, we need to have that*, but there are no dates.

12 And one of my purposes today is to properly manage
13 this case and make sure that everybody is having sufficient
14 opportunity to do what they need to represent their respective
15 clients in this case. But I'm not going to do it based upon
16 this showing, which I find totally unsatisfactory in terms of my
17 ability to keep control over the management of this case.

18 So I'm not inclined just simply to sign a stipulation
19 continuing all the dates and then having you come back in here
20 on April -- in a few months saying *we need another continuance*
21 because if I do grant a continuance, which I obviously am going
22 to do, it's going to be for dates that are going to be certain.
23 They're not going to be continued again. So that's the purpose
24 of spending the time going through this.

25 So the first additional question that I have is the

1 issues that you raise with respect to the CIPA filings relate to
2 discovery issues; correct?

3 MS. HEINZ: Yes, your Honor.

4 THE COURT: And I just want to make sure that I
5 understand the Government's representation, that there is no
6 classified information that the Government intends to offer at
7 the trial.

8 MS. HEINZ: That is correct, your Honor.

9 THE COURT: So we are dealing with discovery-types of
10 information.

11 MS. HEINZ: Yes, your Honor.

12 THE COURT: Then the question that I have is the video
13 and audio recordings that we talked about on October 21st, based
14 upon what -- I went back and looked at the reporter's notes of
15 the hearing. The representation was that all of those many
16 hours of video and audio had been transcribed, except for three
17 transcripts, which were going to be completed within a week of
18 the October 21st Trial Setting Conference.

19 But I see from the stipulation that it doesn't appear
20 that all of those materials have been transcribed or produced to
21 the defendants.

22 MS. HEINZ: Your Honor, they have been transcribed.
23 They have not been produced because many of them are still
24 classified and they have to go through a process to be
25 declassified, and that process is continuing.

1 THE COURT: Why didn't you tell me that at the time of
2 the October 21st Trial Setting Conference because it was my
3 understanding that within a week, the Defense was going to have
4 all of the audio and video recordings of these 50 hours so they
5 could commence investigating and preparing a case for motions or
6 for trial. And so now you're telling me that there is going to
7 be a delay turning those materials over because certain of the
8 information is classified?

9 MS. HEINZ: I apologize, your Honor. I was responding
10 to your Honor's questions, and I should have had the foresight
11 to have told your Honor that the material was classified and
12 needed to be declassified. I apologize for not having that
13 foresight.

14 But the bottom line is much of it has been
15 declassified and has been produced in discovery, but some of it
16 still has not yet been declassified, and that has to be done
17 before it can be produced in discovery.

18 THE COURT: And when is that going to be accomplished
19 by?

20 MS. HEINZ: Your Honor, I don't know.

21 THE COURT: That's my purpose in having this hearing.
22 I need to know, so whomever it is that's responsible for making
23 those decisions and putting people on the case in order to make
24 that determination needs to be here. I'm going to solve that in
25 a minute. But no more of this *I don't know when it's going to*

1 be done because the Defense has -- especially with respect to
2 these 50 hours of audio and video. They need to have all of
3 that information in order to even commence preparing a defense
4 in this case or motions.

5 And here we are, November 6th; I'm thinking that as of
6 October 27th, the Defense has all the information with respect
7 to that 50 hours of evidence and they're busily preparing
8 whatever they are going to prepare. And so I find out, not in
9 any clear way but reading between the lines, that that
10 information hasn't been produced.

11 MS. HEINZ: Special Agent Civiletto has informed me
12 that it will take approximately two weeks to complete the
13 declassification of the transcripts.

14 THE COURT: How many -- does anybody have any -- well,
15 I'm going to solve that at the end of the hearing because you're
16 going -- I'm going to have counsel meet and confer, and you're
17 going to do a Joint Statement so I know exactly what we're
18 talking about in terms of the identity of these matters.

19 All right. So then the other item of discovery is the
20 audio and videotape of the defendant's post-arrest statements,
21 which, according to my notes, was approximately an hour, hour
22 and a half.

23 Am I correct that the audio and videotaped session of
24 the defendant's statements has been produced and that the only
25 thing the Government is trying to do is to prepare or make a

1 better copy of it?

2 MS. HEINZ: It has been produced, your Honor, but the
3 audio is poor, and so the FBI is attempting to make that audio
4 better so that it can be more easily heard.

5 THE COURT: All right. And when is that going to be
6 accomplished?

7 MS. HEINZ: We believe it's been completed, and I
8 should have it out, produced to the Defense this week.

9 THE COURT: All right. Then we have -- the affidavit
10 to the search warrant, according to my memory and my notes, has
11 been produced to the Defense; correct?

12 MS. HEINZ: Yes, your Honor.

13 THE COURT: The Defense has it?

14 MS. CADER: Yes, your Honor.

15 THE COURT: All right. Then there was, during the
16 course of the Trial Setting Conference, discussion about various
17 Facebook pages or videos that appeared on the defendant's
18 Facebook account. Have those been produced?

19 MS. HEINZ: Facebook material has been produced.
20 There is -- from my understanding, there is additional Facebook
21 material that may or may not be duplicative of what has already
22 been produced, and the Government would expect that that would
23 be produced within the next week.

24 THE COURT: All right. And I haven't gone back and
25 looked, but there apparently are a number of items that were

1 seized from the defendant on the date of his arrest: The
2 backpack, the suitcase, the fake passport, flight itinerary, and
3 there was another category -- and I don't know where I got this
4 from -- all documents in evidence the defendant gave to the
5 undercover FBI agent, and there was a hard drive and I believe a
6 cell phone.

7 Is that exhaustive of the list of items that were
8 seized from the defendant at the time of his arrest?

9 MS. HEINZ: I believe so, your Honor.

10 THE COURT: And are --

11 MS. HEINZ: The copies of the documents that were
12 seized from the defendant have been produced in discovery.
13 Things like the suitcase and the clothes are available for
14 defendant's inspection.

15 With respect to the hard drive that was seized from
16 defendant, it has been examined. It contains 1 terabyte of
17 material, all of which is relevant, and it comprises 187 videos,
18 which are training videos for firearms and shooting and which
19 will take a while to review, I'm sure, for the Defense.

20 So we are prepared to produce that in discovery once
21 we receive a blank hard drive and one size 1 terabyte from the
22 Defense.

23 The phone, the Samsung phone, has been examined and
24 that -- the contents have been produced to the Defense.

25 THE COURT: So what's the delay in providing the hard

1 drive?

2 MS. HEINZ: I need -- the Government needs a blank
3 hard drive, your Honor, in order to load the material onto it.

4 MS. CADER: That's the first time that this has been
5 requested of us. We were told that it wasn't available yet, but
6 now that it is, we can provide that hard drive today.

7 THE COURT: All right. And then there are other items
8 of evidence that, according to the Trial Setting Conference,
9 were seized pursuant to the search of the residence. There was
10 some swords, axes, hatchets, and then there were eight
11 computers, four phones, and four gaming devices. What is the
12 status of those items?

13 MS. HEINZ: Well, the weapons are available for the
14 defendant's inspection.

15 With respect to the digital devices, there are five
16 digital devices -- two PlayStations, one phone, one iPod, and
17 one computer -- that have been examined, and the Government is
18 ready to return those to the family.

19 And with respect to the remaining approximately four
20 computers, they are still be examined.

21 THE COURT: And when will that examination be
22 complete?

23 MS. HEINZ: Approximately two weeks, your Honor.

24 THE COURT: And are those available to have the
25 Defense deliver a blank hard drive so they can copy them?

1 MS. HEINZ: Not at this point, your Honor. I think we
2 would anticipate that probably the data that is on those is
3 probably a lot more manageable, and we may be able to produce
4 that in disks or other format and won't require an entire hard
5 drive. But I won't know the answer to that until they've been
6 fully examined.

7 THE COURT: All right. What I'm going to order is the
8 following:

9 I'm going to order counsel to personally meet and
10 confer. We're not going to have an exchange of emails. And as
11 to all of the non-classified information -- non-classified
12 discovery, the Government is going to identify each item of
13 discovery, and if it can be placed into groups, I have no
14 problem with that. And it's going to be disclosed to the
15 Defense and discussed with the Defense.

16 And then the parties are going to prepare a Joint
17 Report, and for each item of non-classified discovery that's
18 going to be included in the report, I want an identification of
19 the item; I want an indication as to whether or not it has been
20 produced; if so, the date of production; and if it hasn't been
21 produced, when it will be produced; and if it's not going to be
22 produced within 10 days of the date of the Meet and Confer, why
23 it's going to take more than 10 days. And I want the Government
24 to indicate what efforts it has made to speed up the disclosure.

25 As far as the Defense's part of that Joint Report, if

1 there are any issues with respect to each or any of the items of
2 discovery, such as it's not legible, you don't have pages, there
3 are pages that are missing, then that should be included in the
4 Joint Report. But if the discovery that has been produced is,
5 in the eyes of the Defense, satisfactory or sufficient, then the
6 defendant shall include a statement in the Joint Report that it
7 has no issues with respect to the production.

8 So that way I will know exactly what it is that's out
9 there, what's been produced, and what's not been produced, and
10 the timetable under which it is going to be produced.

11 During that same Meet and Confer, I understand that
12 the Defense, based upon its filing, has certain issues or have
13 made or are about to make certain requests of the Government to
14 produce certain items, and I'm specifically referring now to
15 Facebook issues, as well as others that are mentioned.

16 I'm not going to breach the in camera filing, but to
17 the extent that the Defense has additional requests of the
18 Government to produce items that they believe are appropriately
19 discoverable during the meet-and-confer process, they should
20 advise the Government what those items are, and then the
21 Government can, in the Joint Report, in their section of the
22 Joint Report, as to those items indicate whether or not they
23 believe they're discoverable or they're not going to produce
24 them or they are going to produce them, and what the issues are
25 with respect to those items. That, in my view, will obviate any

1 discovery motions in this case.

2 To the extent that the Government indicates that
3 they're not going to produce a particular item, obviously if
4 it's in the possession of a third party that the Government
5 doesn't have any control over and they are not obligated under
6 the law to produce, I'm sure the Government will assist the
7 Defense, but the Defense is perfectly capable of issuing
8 subpoenas to any third parties that it believes have possession
9 of relevant material in connection with the defense.

10 So this exercise in the Joint Report gives the Defense
11 an opportunity to determine what the Government will and will
12 not assist, and to the extent that there -- if you want to file
13 a motion, you can file a motion, but don't hold off serving
14 third-party subpoenas because you think you're going to prevail
15 on a Motion to Compel Discovery because if it's available to you
16 through a third-party subpoena, that's the way you're going to
17 get the materials. We're not going to spend an enormous amount
18 of time in discovery -- we're not going to have any discovery
19 motions in this case.

20 All right. Then with respect to the classified
21 information, the Government is going to -- obviously it's not
22 going to be a Joint Report, but it is going to, in an additional
23 filing, advise the Court exactly what we're talking about in
24 terms of classified versus non-classified information or now, as
25 I understand it, certain information -- I can't imagine how the

1 audio and video of the 50 hours of conversations between the
2 defendant and the undercover can possibly be classified.

3 Can you enlighten me as to that?

4 MS. HEINZ: Your Honor, I'm not the classifying
5 authority and the United States Attorney's Office isn't the
6 classifying authority. The classifying authority classified it
7 and --

8 THE COURT: Who's the classifying authority? Is there
9 a person, or are we just dealing with some super government --
10 who is it?

11 MS. HEINZ: The classifying authority would have
12 been -- I don't know the name of the person at the Federal
13 Bureau of Investigation, so -- I don't know the name of the
14 person at the Federal Bureau of Investigation who is the
15 classifying authority, but that is the agency.

16 THE COURT: So what is this person -- what does this
17 he or she do?

18 MS. HEINZ: He or she makes a determination about
19 whether or not material should be classified.

20 THE COURT: And this person is located in Washington,
21 D.C.?

22 MS. HEINZ: Yes, your Honor.

23 THE COURT: And this person now has possession of all
24 of the 50 hours of audio and video of the undercover discussions
25 and discussions with the confidential informant and the

1 defendant?

2 MS. HEINZ: No, not exactly, because some of those
3 have been declassified, your Honor.

4 THE COURT: Okay. The remaining items that the
5 Government is now looking at -- apparently this person who sits
6 in Washington somewhere and sits there and makes a determination
7 as to whether or not there is any remaining classified
8 information on any of those recordings -- does that person have
9 all of those recordings, both audio and video, necessary to make
10 that determination?

11 MS. HEINZ: Yes, your Honor.

12 THE COURT: And when is that determination going to be
13 made?

14 MS. HEINZ: I'm sorry, your Honor. Because it's not
15 mine to be made, I don't know exactly --

16 THE COURT: It's not a question of yours to be made.
17 You represent the United States government. You have an FBI
18 agent here. This person is not a mystery. And what I'm going
19 to do is I'm going to order that person to come to every hearing
20 from now on unless you have some realtime information with
21 respect to how long it's going to take to accomplish things
22 because I'll make an order that by next Friday, it all be done
23 and turned over, whatever is non-classified -- turned over to
24 the Defense, if that's the way you want to proceed.

25 I'm trying to give everybody an opportunity to prepare

1 their case, but I'm not going to sit here and have these dates
2 floating around. If that person needs to be here, then for all
3 future hearings, that person will be here.

4 MS. HEINZ: I understand, your Honor. Could I confer
5 one second?

6 THE COURT: Sure.

7 (Ms. Heinz and Agent Civiletto confer off the record)

8 MS. HEINZ: The transcripts and the recordings should
9 be declassified within the next two weeks.

10 THE COURT: Well, that's not good enough. It's going
11 to have to be done quicker.

12 MS. HEINZ: By a week from Friday.

13 THE COURT: Which is? The 15th?

14 MS. HEINZ: It would be the 15th, your Honor.

15 THE COURT: All right. And what other -- well, that's
16 the purpose of the report that the Government is going to file
17 with respect to identifying for me what the potential -- the
18 identity of the potential classified information is, and
19 similarly as we just went through, the 50 hours of audio and
20 video, when this classifying person from the FBI is going to
21 make the determination as to each of the items that you're going
22 to specifically set forth in this Joint Report, when that
23 decision is going to be made with respect to whether or not it's
24 going to continue to be classified or not classified so I can
25 have an idea then of what it is that we're talking about that is

1 going to remain classified.

2 With respect to the other issues that -- the problem I
3 have with the supplemental notice is when -- what I want to
4 avoid in any future filings is generalizations in terms of the
5 unpredictable time that it will take to do certain things. It's
6 not unpredictable. If there is an estimate, then I need an
7 estimate. And if I don't agree with the estimate, then at the
8 next hearing, I'm going to say that the estimate is not
9 acceptable and that it's going to be done by a certain date and
10 I'm going to enter such an order.

11 But this wait and see about it may happen, it may not
12 happen, it's unpredictable, it's not unpredictable, it's likely
13 to do this, it's likely to do that, doesn't do anything for my
14 ability to make any determinations in terms of dates that I
15 should set in this case.

16 So that's the purpose of what I'm trying to do. I'm
17 trying to make sure that everybody has adequate time to do
18 what's necessary in this case, but I'm not going to, until I get
19 a better comfort level, rely simply on counsel's generalizations
20 that let's try April 1st for a trial date. And as I said,
21 what's going to happen is as it gets close to April, you are
22 going to be running in here saying *I don't have this* or *I do*
23 *have that*, and we're going to eliminate all that by this
24 procedure.

25 And the final item, as best I could -- this is

1 directed to the Defense.

2 As I was able to piece together, we talked about
3 third-party issues. They shouldn't wait. It seemed to me that
4 there were a lot of issues that -- and I appreciate your putting
5 them in the report, but there are a lot of issues that had
6 nothing to do with the defense of the case, and I'm specifically
7 referring now to Paragraph 2 and Paragraph 2(1), that those
8 issues had nothing to do with the defense of the case, but
9 they're more sentencing issues. And if that's not accurate, I
10 am going to need from the Defense a statement or something that
11 there are no issues with respect to your client's competence to
12 stand trial.

13 MS. CADER: I understand, your Honor, and we will
14 provide the Court -- I'm sorry -- we will provide the Court with
15 that analysis when we're able to have it. At this time, we do
16 not believe that that is an issue.

17 THE COURT: All right.

18 MS. CADER: I can say that, your Honor.

19 THE COURT: Because if it's going to be an issue, we
20 need to deal with that issue immediately.

21 MS. CADER: I understand, your Honor.

22 THE COURT: And there are provisions to deal with that
23 issue.

24 MS. CADER: I understand.

25 THE COURT: So as of today, you're representing to me

1 that there is no issue with respect to your client's competence
2 to stand trial.

3 MS. CADER: As of today I am representing that.

4 THE COURT: As soon as there is an issue, you will --

5 MS. CADER: Of course.

6 THE COURT: Okay.

7 All right. The final item that you're going to
8 include in the Joint Report is an identification of the motions
9 that you intend to file in this case, and you're going to
10 discuss those motions and then you're going to set out a
11 schedule for the filing of those motions and oppositions to
12 those motions. We're not going to wait until the end of the
13 case to file all the motions.

14 There are certain motions that are referred to that I
15 understand the Defense is investigating as to whether or not it
16 intends to file in this case. Most of -- I shouldn't say *most*
17 *of*, but those motions that are referenced in, for example,
18 Paragraph 6, the one motion is not going to be necessary based
19 on the Joint Report, but the other motions, it seems to me, are
20 motions that can be filed very early in the case rather than
21 waiting until immediately before trial, because to the extent
22 that any of those motions are case dispositive, we need to have
23 those heard before everybody incurs enormous time and expense in
24 preparing the case for trial.

25 So in your Joint Report, there shall be a section that

1 includes the motions that the Defense reasonably expects to file
2 in this case, and at that point in time, you can meet and confer
3 in terms of trying to resolve any of those motions, and to the
4 extent they can be resolved, then obviously you can indicate in
5 the Joint Report that those motions won't be necessary.

6 But to the extent that you're going to pursue those
7 motions, a briefing schedule that gives you an opportunity to
8 prepare the motions, gives the Government an opportunity to
9 respond, and then a proposed hearing date for those motions.
10 And as I said, you want to get those motions filed and heard and
11 resolved at the earliest opportunity.

12 So does anybody have any questions about the nature of
13 what I'm looking for in terms of this Joint Report?

14 MS. CADER: Your Honor, I believe I have -- I don't
15 have specific questions, but I would want to raise some issues
16 that I want to make sure should be appropriately placed in the
17 report.

18 THE COURT: All right.

19 MS. CADER: The first is that --

20 THE COURT: Why don't you approach the lectern.

21 MS. CADER: I apologize, your Honor.

22 The first is that in the transcripts of the
23 conversations, of which I believe we've received approximately
24 one-third of those conversations --

25 THE COURT: This is the group of the 50 hours of audio

1 and video?

2 MS. CADER: Yes. So we've only received the
3 transcripts. We have not yet received the audio, any of the
4 audio, but my understanding is that there is redactions in the
5 transcripts that are also reflected and are redacted in the
6 audio. When we receive them, they will match.

7 And with our review thus far, we have -- we're making
8 a running log of our questions of some of those redactions that
9 don't seem to be -- they seem to be overly inclusive, and we've
10 raised this issue with the Government, and they have -- they
11 have indicated that when we do give them that information, which
12 we will do as soon as possible, your Honor, that it's not simply
13 an issue of unredacting for them to do, but that they need to go
14 back to their classifying personnel to discuss the redactions.

15 So that's something that I just wanted to make the
16 Court aware of that we will include in our Joint Report as part
17 of the process that we understand.

18 THE COURT: Let me shortcut all of this.

19 Is it now my understanding that when you say that
20 you're producing the audio and video of the 50 -- and we'll call
21 it *the 50 hours*; I don't know how many hours there are -- and
22 that those -- those audio and video recordings have now been
23 reviewed by this person sitting in Washington, D.C., that there
24 are materials on there that are still, in the Government's view,
25 classified and therefore redacted?

1 MS. HEINZ: Yes, your Honor.

2 THE COURT: Well, you know, that's totally
3 inconsistent. Now, that's the third level -- so I'm thinking
4 that the audio and video go to this individual, and the audio
5 and video are then simply given to the Defense. And now the
6 Defense is telling me that there is classified information on
7 there.

8 MS. HEINZ: There are, on the transcripts -- there are
9 specific words, not a lot of them -- but there are specific
10 words that are redacted and that are considered still -- and the
11 transcripts are produced in the form, in the redacted form --
12 they're declassified that way and produced in discovery.

13 The Government has informed the Defense that it is
14 happy to sit down with the Defense and talk about different
15 small redactions that are in these transcripts and happy to work
16 that through with them.

17 But the Government -- it's true that if the Defense
18 wants something unredacted, the Government will have to -- the
19 prosecutor will have to go back to the FBI and say, *Can this be*
20 *unredacted or at least revealed to the Defense in some way* and I
21 will have to get an answer from the classification authority.

22 THE COURT: Now, why would you ever think that the
23 Defense is going to accept a redacted document and not ask you
24 to do exactly what you just said, to go back to the Classified
25 Information Officer to unredact it? I mean, there is no defense

1 lawyer in the world that is going to simply accept the
2 Government's redacted versions.

3 So knowing that, it would seem to me that you should
4 immediately have gone back to this person and said, *What are all*
5 *these redactions? Are they really necessary?*

6 MS. HEINZ: And, your Honor, I did go back with
7 respect to certain redactions and say, *I don't think this is*
8 *necessary* and talk to the classifying authority, and in some
9 cases, the classifying authority has lifted the redactions, and
10 we are producing revised transcripts.

11 But with respect to certain items there, I thought
12 that it was better -- and this is not a new discussion. We've
13 been having a discussion with defense counsel about this. I
14 thought that defense counsel should see those and should come
15 back and say, *Okay, I really need to know what's under this*
16 *small little piece of black here*, in which case then I can
17 address it with the classifying authority.

18 THE COURT: Why wouldn't they want to see what's
19 underneath the redaction?

20 MS. HEINZ: Well, in some cases, your Honor, it is a
21 completely irrelevant conversation that just simply happened to
22 get captured on the tape.

23 THE COURT: Well, then it shouldn't be any problem
24 with the classifying officer if it's totally irrelevant. I
25 mean, that's what I don't understand. You can't -- all right.

1 Well, then I guess I want this Joint Report done immediately.

2 With respect to the redactions, I'm going to ask you
3 to start the process with this Classified Information Officer
4 and give that Classified Information Officer my view that none
5 of these redactions, especially with respect to this 50 hours --
6 I can't imagine why there's classified information on there, but
7 to the extent there is, they better have a good reason, and they
8 really need to go through those redacted transcripts with a view
9 of providing -- obviously pursuant to a protective order or some
10 other vehicle -- the Defense with unredacted transcripts. And
11 then I'll deal with that issue later on, and it's going to be in
12 the form of some kind of a Joint Report.

13 We're going to have to have a showing as to each of
14 those redacted items and then we're going to have the Classified
15 Information Officer out here making determinations, probably in
16 short order.

17 All right. What else?

18 MS. CADER: Your Honor, as --

19 THE COURT: You know, in the future, will you please
20 let me know what we're dealing with and talking about in terms
21 of this discovery. Each time I talk to you, I find a new level
22 of issues. And my purpose is to set dates that are meaningful
23 dates, and I don't want to have this discussion again.

24 MS. HEINZ: Yes, your Honor. I will be happy to add
25 some more items after the defense counsel is finished.

1 MS. CADER: Your Honor, as far as the Government's
2 Notice of an Intent to File Materials Pursuant to Section 4 of
3 CIPA, as the Court knows from our pleading regarding our
4 objection to that, I guess, anticipated filing, one of our
5 requests of the Government has been that we be -- start the
6 process for security clearance for our team if -- so that if
7 this issue, when they file this information, becomes relevant,
8 we can have at least some level of clearance to be able to argue
9 that we should be able to see it.

10 THE COURT: Well, you don't need security clearance to
11 argue that you should see it. You're not going to see it. It's
12 going to come to me, and I'm going to make the determination
13 that you're not entitled to be present during that examination,
14 as I understand Section 4 -- and this is my first time with the
15 Classified Procedures Act, but based upon what I read -- I don't
16 know what to tell you in terms of -- you can apply on your own
17 for a top secret clearance, can't you? I mean, you don't need
18 the Government.

19 MS. CADER: We can apply for our team for clearance.
20 I haven't looked into --

21 THE COURT: Isn't there someone in your office that
22 already has a clearance?

23 MS. CADER: There likely is someone who has a
24 clearance, your Honor. I don't believe our office has dealt
25 much with CIPA either, but I can look into that.

1 THE COURT: We're not going to delay the process of
2 the trial for someone to get a top secret clearance. You should
3 have someone over in your office who has a top secret clearance
4 who can be added on to this case to assist, if there is any
5 ability to participate in these proceedings, and obviously if
6 there is, there is a need for a top secret clearance.

7 MS. CADER: I'll make that determination --

8 THE COURT: I'm sure Mr. Kennedy has a top secret
9 clearance because of his regal position as head of the Public
10 Defender's Office. I know court reporters have top secret
11 clearance.

12 MS. CADER: I will ascertain that, your Honor. Just
13 wanted to -- because it's my first time dealing with CIPA as
14 well, I wanted to be clear about my -- about my filing in that I
15 think -- what the Government has represented is that it's
16 supplemental filing with the classified information, which it
17 filed in camera and ex parte, was not pursuant to Section 4. It
18 was something separate from that. I don't know --

19 THE COURT: Well, there wasn't any classified
20 information in the filing. It was simply an identification of
21 things that could possibly come to light and some attempts to
22 educate me in terms of how that's going to come about and when
23 it's going to come about.

24 MS. CADER: I understand. So then my --

25 THE COURT: That's why I didn't understand and I

1 started the hearing off with why wasn't it filed on the public
2 record because I didn't view -- even though it has a red cover
3 on it with *SECRET* on it, I --

4 MS. CADER: Then my motion was premature, your Honor.

5 THE COURT: I think so.

6 MS. CADER: So then it would just be relevant for if
7 there are future Section 4 filings.

8 THE COURT: Right. But in terms of the top secret
9 clearance, I think you need to find somebody over in your office
10 who has -- I'm sure Mr. Iverson, after all his years of being in
11 the Public Defender's Office -- he is left, isn't he? He's
12 still there?

13 MS. CADER: He is still there, your Honor.

14 I will see, and we will make those representations in
15 the joint pleading to the Court.

16 THE COURT: Okay.

17 MS. CADER: And those are all the questions that I
18 had, your Honor.

19 THE COURT: All right. So then the question is when
20 we're going to get the Joint Report.

21 So my suggestion is that counsel meet and --
22 personally meet and confer by November 13th and file the Joint
23 Report by November 15th, and then we'll have a further hearing
24 the following week.

25 How is November 19th at 10:00 on counsel's calendars?

1 MS. CADER: The Court's indulgence.

2 MS. HEINZ: That's fine with the Government,
3 your Honor.

4 MS. CADER: That's fine, your Honor.

5 THE COURT: All right. So that will be the schedule.

6 Is there something else the Government wants to add to
7 educate me in terms of --

8 MS. HEINZ: Well, yes, your Honor. I know this -- I
9 thought that I -- we had covered this in the supplemental
10 filing, but I -- in -- to make sure that we brought to the
11 Court's attention where I think, you know, time problems happen
12 in these kind of cases, and they often happen when we get into
13 CIPA filings where the Government has to go to other agencies
14 who are not involved in the case and get information from them,
15 declarations from them to assist and attach to filings, and that
16 often takes time, your Honor. It also takes time to review
17 classified information to be able to write the filings.

18 And beyond that, I really can't be more specific in
19 this arena. I will try to be more specific in the classified
20 filing that your Honor has asked us to file.

21 THE COURT: There are no dates in the supplemental
22 filing. I mean, I've got *unpredictable, don't know*, and that's
23 just simply not going to be acceptable. If it's going to take a
24 year, then tell me it's going to take a year and I'll deal with
25 it, but I'm not going to deal with unpredictability because, in

1 my view, it's all predictable because these are all human beings
2 who have jobs, they have functions, and they have other things
3 to do, and they have schedules.

4 And I'm not trying to be onerous, but I'm not going to
5 let this case just bounce along because somebody in Washington
6 isn't paying attention to what needs to be paid attention to.

7 And I'm not accusing or saying that that's true, but I
8 want to keep control over the management of this case so that we
9 can proceed in an orderly fashion and the Defense can have
10 everything they are entitled to, and both the Government and the
11 Defense can adequately prepare the case for trial, and then if
12 there is going to be a trial, to try the case.

13 But we're going to do it on my schedule and not on
14 counsel's schedules or some Classified Information Officer's
15 schedule. I'm going to set the schedule.

16 So I need hard dates or estimates of hard dates in all
17 of the filings. And especially this Joint Report. Because the
18 next time we meet, I'm going to set dates, and those are going
19 to be the dates, and they're not going to change. Because
20 April 1st, in my view, is unrealistic. I mean, that I can tell
21 you right now is not going to happen based upon what I know of
22 the case.

23 All right. Anything else?

24 MS. CADER: No. Thank you, your Honor.

25 MS. HEINZ: Thank you, your Honor.

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THE COURT: All right. Thank you very much.

(Proceedings adjourned at 11:57 a.m.)

1 CERTIFICATE OF OFFICIAL REPORTER

2
3 COUNTY OF LOS ANGELES)
4 STATE OF CALIFORNIA)

5
6
7 I, Pamela A. Batalo, Federal Official Realtime Court
8 Reporter, Registered Professional Reporter, in and for the
9 United States District Court for the Central District of
10 California, do hereby certify that pursuant to Section 753,
11 Title 18, United States Code, that the foregoing is a true and
12 correct transcript of the stenographically reported proceedings
13 held in the above-entitled matter and that the transcript page
14 format is in conformance with the regulations of the Judicial
15 Conference of the United States.

16
17 Date: November 7, 2013
18

19
20 /s/ Pamela A. Batalo
21 Pamela A. Batalo, CSR No. 3593, FCRR, RMR
22 Federal Official Court Reporter
23
24
25